Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MILLER AND SON PAVING, INC.,

Petitioner,

vs.

PLUMSTEAD TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

CATHERINE M. HARPER
Counsel of Record
TIMONEY, KNOX, HASSON
& WEAND, L.L.P.
Attorneys for Respondent
400 Maryland Drive
P.O. Box 7544
Fort Washington, PA 19034-7544
(215) 646-6000

150336

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Pennsylvania Supreme Court interpret federal constitutional law correctly in determining that a zoning ordinance ruled "exclusionary" because of its failure to zone for quarries did *not* automatically effect a *de facto* "temporary taking" under the Fifth Amendment to the United States Constitution for the period of time during which the property owner challenged the Zoning Ordinance in order to use his residentially-zoned property as he wished, when the regulation in question never deprived the property owner of all economically beneficial uses of the land?

TABLE OF CONTENTS

Page

Counterstatement of Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Counterstatement of the Case 1

Reasons for Denying the Writ 11

I. The Pennsylvania Supreme Court Rendered A Decision Consistent With This Court's Decisions Regarding "Takings" And "Temporary Takings" In Determining That A Property Owner Who Was Never Deprived Of All Beneficial Economic Use Of His Property During The Time Spent Challenging A Municipal Zoning Ordinance, Did Not Suffer A Temporary Taking. 11

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Agins v. City of Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106 (1980) 15

Appeal of D.R.E. Land Developing, Inc., 613 A.2d 96 (Pa. Cmwlth. Ct. 1992) 9

Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 13

Board of Supervisors of Plumstead Township v. Miller and Son Paving, Inc., 646 A.2d 1182, 58 Pa. 629 (1995) 8

Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 328 A.2d 464 (1974) 1

Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926) 13

Exton Quarries, Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967) 1

Fernley v. Board of Supervisors of Schuylkill Township, 509 Pa. 413, 502 A.2d 585 (1985) 6

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. § 304 (1987) 9, 10, 11, 12, 13, 16, 18, 20, 21

Cited Authorities

	Page
H & R Builders Inc. v. Borough Council of the Borough of Norwood, 124 Pa. Cmwlth. 88, 555 A.2d 948 (1989)	1, 19
Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987)	20
Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)	16
MacDonald, Somer and Frates v. County of Yolo, 477 U.S. 340, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986)	16
Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)	15, 20
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)	18
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 137 L. Ed. 2d 980, 117 S. Ct. 1659 (1997)	16, 18
Surrick v. Zoning Hearing Board of Upper Providence Township, 476 Pa. 182, 382 A.2d 105 (1997)	2
Upper Salford Township and Upper Salford Township Citizens for Open Space v. Patrick T. Collins Jr., 162 Pa. Cmwlth. 403, 639 A.2d 861 (1994), *reversed* at 542 Pa. 608, 669 A.2d 335 (1995)	19

Cited Authorities

	Page
Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974)	13
Statutes:	
26 P.S. § 1-101 *et seq.*	2
53 P.S. § 10101 *et seq.*.	1
53 P.S. § 11006-a(c)	6
MPC § 604(1)	14
MPC § 604(4)	2
MPC § 916.1	1
MPC § 916.1(d)	1
MPC § 916(c)(6)	1
MPC § 916.1(g)	1
MPC § 1006A(c)	1, 6
United States Constitution:	
Fifth Amendment	

Cited Authorities

Page

Other Authorities:

ALR Annotation "Exclusion from Municipality of Industrial Activities Inconsistent with Residential Character," 9 ALR 2d 683 (1950) 2

Report of the Pennsylvania 21st Century Environment Commission (Sept. 1998) 3

Taking on a new direction: the Rehnquist/Scalia approach to regulatory takings, Temple Law Review, Volume 66, p. 197, 215 (1993) 17

COUNTERSTATEMENT OF THE CASE

Miller and Son Paving, Inc., ("Miller") purchased a 150 acre farm in a residential zone in rural Plumstead Township, Bucks County, Pennsylvania, knowing that the zoning ordinance did not permit quarrying on the land, and filed a curative amendment the same day under the Pennsylvania Municipalities Planning Code seeking a quarry and other industrial uses.[1]

---

1. Planning and zoning in Pennsylvania are handled by the Commonwealth's 2500 municipalities under the Pennsylvania Municipalities Planning Code, ("MPC") Act of 1968, P.L. 805, No. 247, as reenacted and amended from time to time, 53 P.S. § 10101 *et seq.* A "curative amendment" pursuant to Section 916.1 of the MPC [previously 53 Purdon's Statutes 11004] is directed either to the zoning hearing board or to the governing body as a challenge to the validity of a township's zoning ordinance or zoning map and the landowner submits the proposed "curative" zoning amendment to address the perceived deficiency. An applicant who successfully challenges a zoning ordinance as "unconstitutionally" exclusionary is entitled to site specific relief, or, in other words, approval of the application. *See H & R Builders Inc. v. Borough Council of the Borough of Norwood*, 124 Pa. Cmwlth. 88, 555 A.2d 948 (1989), holding that exclusion of junkyards from all zones within a municipality excludes a "legitimate business" which renders the zoning ordinance invalid and entitles the successful challenger to site-specific relief in accordance with *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974). *See also* MPC § 1006A(c) and § 916.1(g). As to invalidity of zoning ordinances which impose a municipality-wide exclusion of a "legitimate business use" (or simply fail to provide a zone for such a use), *see Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967), and its progeny.

The MPC also contains a number of procedural safeguards requiring hearings on the curative amendment to commence within sixty days after the request is filed (Section 916.1(d)), and also requiring that a decision be rendered within 45 days after the conclusion of the last hearing (Section 916(c)(6)).

After hearings at the township level, and a series of appeals, seven years later, the Pennsylvania Commonwealth Court (an intermediate appellate court) ruled that Miller was entitled to the use of its property as a quarry, but was not entitled to the bituminous asphalt plant or ready-mix concrete plant that it also sought on the same site because the Court found that the ordinance excluded quarries but not bituminous asphalt plants or ready-mix concrete plants. *In re Miller and Son Paving, Inc.*, 161 Pa. Cmwlth. 138, 636 A.2d 274 (1993), *allocatur denied*, 538 Pa. 629, 646 A.2d 1182 (1994). In December 1994, while the Township sought allocatur review of the Commonwealth Court decision, Miller filed a petition under the Pennsylvania Eminent Domain Code, 26 P.S. § 1-101 *et seq.*, alleging a temporary *de facto* taking as a result of the Commonwealth Court ruling that the Plumstead Township Zoning Ordinance unconstitutionally excluded quarrying.[2] *In Re Appeal of Miller*

---

2. Pennsylvania law has long required that zoning ordinances include a variety of dwelling types and a "fair share" of these dwelling types. *Surrick v. Zoning Hearing Board of Upper Providence Township*, 476 Pa. 182, 382 A.2d 105 (1997); *see also* 1988 Amendments to the Municipalities Planning Code, sec. 604(4). In addition, a number of cases have held that a zoning ordinance which effectively excludes from the municipality a legitimate business or commercial land use is unconstitutional and "exclusionary" for a failure to provide a place for that land use (*see* Footnote 1). The Commonwealth Court decision essentially found that the Plumstead Township Zoning Ordinance was unconstitutionally exclusionary in that it failed to provide a "quarry zone" although it did permit bituminous asphalt plants and ready-mix concrete plants in its Limited Industrial zone. A quarry is in operation on the site today. In apparently requiring every municipality to make provision for every commercial and industrial use, in addition to its "fair share" of housing, Pennsylvania may be unusual. *See, for example*, ALR Annotation "Exclusion from Municipality of Industrial Activities Inconsistent with Residential Character," 9 ALR 2d 683 (1950), and Pennsylvania cases cited in the 1997 Later Case Service for the same

(Cont'd)

and Son Paving, Inc., 161 Pa. Cmwlth. 138, 636 A.2d 274 (1993).

The township filed preliminary objections alleging that no temporary taking had occurred and seeking an evidentiary hearing, and those preliminary objections were eventually dismissed. The dismissal was affirmed by the Commonwealth Court, and the township filed a petition seeking allowance of appeal to the Pennsylvania Supreme Court, which was ultimately granted. The Court granted allocatur on the question of whether invalidating a zoning ordinance automatically results in a temporary *de facto* taking during the time between the filing of the curative amendment challenge and the order granting site specific relief. *Miller and Son v. Plumstead*, 547 Pa. 383, 690 A.2d 711 (1997).

After argument, the Pennsylvania Supreme Court reversed the lower courts and ruled that it did not. *Miller and Son Paving,*

(Cont'd)

article. This may also be changing. *See, for example, Report of the Pennsylvania 21st Century Environment Commission* (Sept. 1998), which concludes that "the challenge of promoting responsible land use" is the top priority for Pennsylvania's 21st century. The report specifically notes:

> Current development patterns combined with Pennsylvania's land use laws, the number (2,571) of municipalities with land use authority and insufficient intermunicipal coordination on land use issues work to foster [suburban] sprawl, not deter it. Court-made rules, reacting to this fragmentation, exacerbate the situation by requiring that every municipality that chooses to plan and zone must provide for every use — all kinds of housing, commercial and industrial uses.

Report of the Pennsylvania 21st Century Environment Commission (Sept. 1998), p. 17. (Also available at http://www.21stcentury.state.pa.us.).

Inc. v. Plumstead Township, Pa. Supreme Court Docket 19 E.D. Appeal Docket 1997, 717 A.2d 483, 1998 WL 567955 (August 19, 1998). Since the petition for Board of Viewers under the Eminent Domain Code seeks damages for the time between the filing of the curative amendment and the final order of the Commonwealth Court which permitted the quarry to operate, a more detailed history of the case is warranted to understand the issues involved.

On June 17, 1988, when Miller and Son Paving, Inc. purchased 150 acres of residentially-zoned land in Plumstead, the property was zoned "R-1" which permitted:

(a) single family detached dwellings on lots of 60,000 square feet or, as a cluster development, on lots of 12,500 square feet at a density of one unit per acre;

(b) farm and accessory buildings;

(c) farm stands;

(d) public buildings, parks and recreation areas;

(e) accessory uses;

(f) home occupations;

(g) accessory offices for a physician, lawyer, clergyman, teacher or other profession;

(h) telephone or utility substation.

And by special exception, on lots not less than five acres:

(a) private educational, religious or philanthropic uses;

(b) public, private or parochial schools;

(c) church or other place of worship (and/or)

(d) fire station.

Before Miller's successful challenge to the Plumstead Zoning Ordinance, its land was a farm and was used agriculturally in accordance with the zoning.

The Plumstead Township Board of Supervisors (the elected governing body of the municipality) held hearings and rejected the curative amendment, finding, instead, that quarries, bituminous asphalt plants and concrete mixing plants were all permitted in the LI — Limited Industrial District, governed by Article X of the Plumstead Township Zoning Ordinance which permitted, *inter alia*, "any industrial use of the same general character as any of the above permitted uses when authorized by the Zoning Hearing Board as a special exception." Miller appealed to the Bucks County Court of Common Pleas and, on March 30, 1993, the Order of the Board of Supervisors of Plumstead Township denying the curative amendment was affirmed. The Bucks County Court of Common Pleas determined that the ordinance excluded quarrying, but confirmed the Supervisors' denial of the curative amendment application because the Court concluded that Miller's property was not suitable for quarrying. Miller appealed the decision of the Court of Common Pleas to the Commonwealth Court, and on December 30, 1993 the Commonwealth Court issued an opinion and order finding that:

> Common Pleas is affirmed insofar as it ruled that the ordinance excludes quarrying. It is affirmed insofar as it impliedly rules that the ordinance does not exclude bituminous asphalt plants and ready-mix concrete plants. It is reversed insofar as it ruled that Miller is not entitled to site specific relief.

The case was thereafter remanded to the Bucks County Court of Common Pleas pursuant to Section 1006-a(c) of the Pennsylvania Municipalities Planning Code, 53 P.S. § 11006-a(c) to determine

> whether Miller's use of the property as a quarry is "approved as to all elements" or "approved as to some elements [requiring] other elements [to be referred] to the governing body . . . for further proceedings. . . .

(Commonwealth Court Opinion), *In Re Appeal of Miller*, 636 A.2d 274, 161 Pa. Cmwlth. 138 (1993) (Miller I).

On remand to the Court of Common Pleas of Bucks County, President Judge Kenneth Biehn ruled that Miller was entitled to operate a quarry, a bituminous asphalt plant and a ready-mix concrete plant on the site, believing the Court of Common Pleas was required to grant the challenging landowner permission to develop the land as proposed in the curative amendment once an ordinance was found to be unconstitutionally exclusionary under *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985). The Township appealed that order to the Pennsylvania Commonwealth Court, and the Commonwealth Court once again reviewed the case, this time ruling that the Court of Common Pleas order dated June 5, 1995 was to be reversed (again).

In a memorandum opinion by Senior Judge Emil Narick in support of the Commonwealth Court's order, the Commonwealth Court held that the Bucks County Court of Common Pleas had abused its discretion in approving Miller's use of the property as a "quarry, bituminous asphalt plant and ready-mix concrete plant" based on the following rationale:

> Having found that the zoning ordinance did not exclude asphalt and concrete plants, *Miller I* remanded to the trial court for one purpose, to determine the extent to which Miller may establish a quarry on its property. However, the trial court approved not only the quarry, but also the asphalt and concrete plants. This was directly contrary to the findings in *Miller I* where we expressly stated that: "Our review of this record reveals that the Board concluded that the ordinance permits bituminous asphalt plants and ready-mix concrete plants by special exception in the limited industrial district and we agree. . . Consequently we affirmed the Board's decision that the ordinance does not exclude bituminous asphalt plants or ready-mix concrete plants." *Id.* at 146, 636 A.2d at 277-278. The Common Pleas elected to ignore this Court's order as well as the reasoning upon which it was based and instead concluded: "Consequently the Commonwealth Court's order in the instant case ruling that bituminous asphalt plant and ready-mix concrete plants are not excluded by the Plumstead Township Zoning Ordinance has no bearing on the relief to which Miller is entitled, and that is the adoption of its development plan filed with its curative amendment." (Trial Court Opinion at 5). . . . However the only use which was *unlawfully omitted* from the ordinance was the quarry, and not

> the asphalt and concrete plants. . . . Neither *Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985), nor *Ellick v. Board of Supervisors*, 17 Pa. Cmwlth. Ct. 404, 333 A.2d 239 (1975), cited by the Trial Court, authorized the Court to approve plans submitted by a landowner which include uses an appellate court has found not to be excluded in the zoning ordinance.
>
> Opinion of Emil E. Narick, Senior Judge, in *Miller and Son Paving, Inc. v. Plumstead Township, Bucks County*, No. 2610 Commonwealth Court Docket 1994) (unreported) (Miller II).

Having pursued its necessary permits during the pendency of the zoning litigation, Miller established its quarry on the site shortly after the Pennsylvania Supreme Court declined to hear the Township's appeal. *Board of Supervisors of Plumstead Township v. Miller and Son Paving, Inc.*, 646 A.2d 1182, 58 Pa. 629 (1995).

Ironically, Miller's petition for appointment of viewers under the Eminent Domain Code was already a year old at this point, having been filed on June 21, 1994 after *Miller I*, the first Commonwealth Court opinion, that determined that the Plumstead Township Zoning Ordinance unconstitutionally excluded quarrying. Miller's petition under the Eminent Domain Code sought a determination that there had been a *de facto* temporary taking of its property during the period of time that it was challenging the constitutionality of the Plumstead Township Zoning Ordinance. On January 24, 1995, President Judge Kenneth G. Biehn of the Bucks County Court of Common Pleas granted Miller's Petition and appointed a Board of Viewers to assess the damages. The Township filed preliminary objections alleging, *inter alia*, that no *de facto* taking of the

property had occurred merely upon the finding that the Plumstead Zoning Ordinance unconstitutionally excluded quarrying; that the "takings" claim was not yet "ripe," and arguing that even if the Zoning Ordinance did unlawfully exclude quarrying, Miller had never been denied all use of its property and was therefore not entitled to compensation.

Without a hearing, the Bucks County Court of Common Pleas dismissed the preliminary objections, holding, as a matter of law,

> the Township ordinance, subsequently invalidated, comprised an "exceptional circumstance" that deprived Miller of the use and enjoyment of the property, with Miller incurring the cost of carrying the property in a curative amendment challenge

(Opinion of Judge Cynthia Weaver appended to petitioner's petition).

Judge Weaver's decision was affirmed by the Commonwealth Court in an opinion filed June 21, 1996 in which the Court, in citing United States Supreme Court Opnion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. § 304 (1987), opined

> Courts of this Commonwealth have not required a landowner to prove that he or she has been deprived of all beneficial use of the property. To establish a *de facto* taking, the landowner must establish that there were exceptional circumstances which substantially deprive the property owner of the beneficial use and enjoyment of his or her property

citing Appeal of D.R.E. Land Developing, Inc., 613 A.2d 96 (Pa. Cmwlth. Ct. 1992) (*see* Appendix B to petitioner's petition,

Commonwealth Court Opinion). *Miller and Son Paving, Inc. v. Plumstead Township, Bucks County*, 680 A.2d 5 (1996).

The Pennsylvania Supreme Court granted allocatur on the question stated as follows: "The petition for allowance of appeal is granted limited to whether invalidating a zoning ordinance constitutes an automatic *de facto* taking." 690 A.2d 711, 547 Pa. 383 (1997).

After briefing and oral argument, the Pennsylvania Supreme Court reversed the Commonwealth's determination that an automatic temporary *de facto* taking occurred during the period between when Miller Quarry filed its curative amendment and when it was finally granted site-specific relief.

The Pennsylvania Supreme Court cited both the Pennsylvania Constitution ("Nor shall private property be taken or applied to public use, without authority of law and without just compensation being made or secured") and the Fifth Amendment to the United States Constitution ("No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation") in making its decision (*see* Appendix A to petitioner's petition).

The Pennsylvania Supreme Court concluded that *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), did not support the Commonwealth Court's conclusion that invalidating a zoning ordinance automatically effects a *per se* temporary taking. Instead, the Supreme Court noted: "Unlike the landowner in *First English*, however, Miller was not denied all use of its property, but was rather illegally denied the use of quarrying." The Court also noted that the *First English* decision was specifically limited to the facts presented in that case and cited this Court's statement that *First English*

> [did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.

Id. at 321 (cited in the Supreme Court Opinion attached to petitioner's petition as Appendix A).

Miller seeks this Court's writ of certiorari on this issue. The Township contends the Pennsylvania Supreme Court correctly applied this Honorable Court's decision in *First English* to determine that no "temporary taking" occurred during the time the landowner challenged the zoning ordinance.

REASONS FOR DENYING THE WRIT

I.

THE PENNSYLVANIA SUPREME COURT RENDERED A DECISION CONSISTENT WITH THIS COURT'S DECISIONS REGARDING "TAKINGS" AND "TEMPORARY TAKINGS" IN DETERMINING THAT A PROPERTY OWNER WHO WAS NEVER DEPRIVED OF ALL BENEFICIAL ECONOMIC USE OF HIS PROPERTY DURING THE TIME SPENT CHALLENGING A MUNICIPAL ZONING ORDINANCE, DID NOT SUFFER A TEMPORARY TAKING.

Prior to this Honorable Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), Pennsylvania regarded a landowner's sole remedy for challenging a zoning regulation as the site-specific relief available under the Pennsylvania Municipalities Planning Code (*see* Pennsylvania Supreme Court Decision, Appendix 8A, fn. 7, and cases cited therein). In its

decision in *Miller and Son Paving, Inc. v. Plumstead Township*, however, the Pennsylvania Supreme Court recognizes that a landowner can now get "temporary takings" damages when the landowner is deprived of all beneficial use and enjoyment of his property (as was the assumption in the *First English* case). However, the Pennsylvania Supreme Court distinguishes that case on a number of grounds:

> We noted that a taking does not result merely because a regulation may deprive the owner of the most profitable use of his property. Otherwise, all zoning regulations could be categorized as "takings" in the sense that the owner is not completely free to use his property as he chooses. Here, the property was zoned residential. Although the ordinance deprived Miller of the use of quarrying, other viable uses clearly existed. [Footnote listing all other permissible uses in the district omitted]. Accordingly, we hold that the lower courts erred in concluding that the invalid zoning ordinance constituted a taking of Miller's property (6a). . . . *First English* does not require a contrary result. There, the County of Los Angeles adopted an interim ordinance prohibiting the construction or reconstruction of any building or structure in a flood protection area. The appellant, a church that had purchased property in the protected area prior to the adoption of the ordinance, sought damages for the loss of use of the property. . . . Unlike the landowner in *First English*, however, Miller was not denied all use of its property, but was rather illegally denied the use of quarrying.
>
> Second, *First English* did not involve the invalidation of an unconstitutional zoning

> ordinance. The landowners did not challenge the validity of the ordinance but merely sought damages pursuant to a takings claim. Thus, *First English* does not support the conclusion reached by the Commonwealth Court that an invalid zoning ordinance effects a *per se* temporary taking (7a). . . . Finally, the decision in *First English* was specifically limited to the facts presented. The Court explained that it "[did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinance, variances and the like which are not before us" *citing First English, id* at 321 (8a).

The decision of the Pennsylvania Supreme Court is entirely consistent with *First English* and its predecessors and its progeny.

The United States Supreme Court has long recognized the validity of zoning ordinances generally. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926).

As Mr. Justice Douglas eloquently stated in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974),

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, [348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98], the police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones

> where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The Pennsylvania Municipalities Planning Code provides that municipalities who choose to zone in Pennsylvania may enact ordinances that shall be designed (in part):

> to promote, protect and facilitate any or all of the following: the public health, safety, morals, and general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agriculture or industrial use, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forest, wetlands, aquifers and floodplains.

Pennsylvania Municipalities Planning Code, Section 604(1).

The petitioner did not challenge the entire Plumstead Township Zoning Ordinance on the grounds that it exceeded its police powers. On the contrary, the applicant's challenge was limited to a complaint that the zoning ordinance made a *de facto* exclusion of an otherwise lawful and legitimate use (quarrying) by failing to provide for a zone or area where quarrying could legally take place in Plumstead Township.

Under Pennsylvania Zoning Law, that rendered the Plumstead Township Zoning Ordinance unconstitutionally infirm, and permitted the challenger the remedy of site specific relief (operation of a quarry in a residential zone). The challenge took approximately seven years to be heard by the highest court in the land (actually allocatur was denied, thus rendering the Commonwealth Court's decision final). Approximately half of this time was spent in hearings at the Township level on evidentiary matters relating to the unconstitutionality of the zoning ordinance and the suitability of the site for site specific relief. The other half of the time was spent in the courts (*see* the Counterstatement of the Case for the tortured procedural history of this matter). The time period for the alleged "temporary taking" was consumed entirely by the process of challenging a zoning ordinance enacted some years before the challenge was brought.

This Honorable Court has never held that mere diminution in value (without physical occupation by a government possessed with the power of eminent domain) is a compensable taking. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

Moreover, zoning ordinances, in general, have long been recognized as legitimate exercises of the police power. As in *Agins v. City of Tiburon*, 447 U.S. 255, 65 L. Ed. 2d 106 (1980), the case at bar presents the question, "whether the mere enactment of the zoning ordinance constitutes a taking." *Id.* at 2141, at 261. Where zoning laws bear a substantial relationship to the public welfare, this Court has recognized that they are appropriate under the police powers of government, and only effect a taking where the property owner is deprived of all economically viable use of his land. *Agins v. City of Tiburon, id.*, at 2142.

The purposes behind the enactment of Plumstead's comprehensive zoning scheme, designed as they are to meet

the requirements of the Pennsylvania Municipalities Planning Code, are legitimate to police power purposes. It is recognized, of course, that legitimate police power regulations can "go too far" and thereby effect a taking, **but the cases in which this Court has found a compensable "taking," the property owner has been deprived of all economically beneficial use of his land**. *First English Evangelical Lutheran Church v. County of Los Angeles, id., see also MacDonald, Somer and Frates v. County of Yolo*, 477 U.S. 340, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986), *rehearing denied*, 478 U.S. 1035, 92 L. Ed. 2d 773, 107 S. Ct. 22 (1986), and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 137 L. Ed. 2d 980, 117 S. Ct. 1659 (1997); *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). This Court has carefully distinguished between cases in which the property owner suffered a mere diminution in value and those involving total regulatory takings. *Lucas v. South Carolina Coastal Counsel, id.*, at 1026.[3]

---

3. Interesting in the context of the present case is the discussion in *Lucas v. South Carolina Coastal Counsel, id.*, of the notion that this Honorable Court's opinions "have suggested that 'harmful or noxious uses' of property may be proscribed by government regulations without requirement of compensation." This is sometimes referred to as the "nuisance exception." The case at bar, of course, involves the petitioner's attempt to establish a quarry (and bituminous asphalt plant and concrete mixing plant) in a residential zone. This result was permitted under Pennsylvania land use law as the site-specific relief to which a successful challenger is entitled when the landowner proves that the zoning ordinance excludes a legitimate land use. At least one commentator on the *Lucas* case, however, discussing the nuisance exception, made the following point:

> Historically, the nuisance exception allowed government to *prevent harm* by regulating conduct akin to a public nuisance. For example, operation of a cement plant in a

(Cont'd)

Your petitioner asserts that it "must be conceded by all" that a zoning ordinance that

---

(Cont'd)

> residential area would constitute a nuisance and, thus, could be regulated without the need for compensation because such regulations did not effect a taking . . . the Court previously used prevention of harm as justification for uncompensated regulations under the "nuisance exception"doctrine; while the current court employs the public benefit rationale to justify uncompensated regulations under the "legitimate state interest" doctrine. [Justice] Scalia understands the nuisance exception simply to be an early analytical justification for uncompensated regulations. As such, the exception is consistent with [later cases]. Thus, even if government maintains its regulation is enacted to combat a nuisance, the regulation requires compensation if it *completely* destroys property value . . . therefore, if a regulation entirely destroys property's value, the regulation cannot claim to be abating a nuisance because the regulation has destroyed legitimate sources of value as well.

Taking on a new direction: the Rehnquist/Scalia approach to regulatory takings, Temple Law Review, Volume 66, p. 197, 215 (1993). One could argue, therefore, had the case not already been decided under Pennsylvania's land use laws, that Miller should not be entitled to establish its quarry in a residential zone and prohibition on such uses in a residential zone does not implicate any federal constitutional rights of a landowner (Miller). However, since both the remedy to the successful challenge and the quarry have already been established in the case at bar, respondent does not make that argument here, but merely points out that Pennsylvania's land use laws, and specifically the Pennsylvania Municipalities Planning Code, in providing site-specific relief to the successful challenger of a zoning ordinance as excluding an otherwise legitimate use, provide a remedy and a mechanism for challenging land use regulations. The time it takes to pursue the remedy has not heretofore constituted a compensable "taking."

> unlawfully prevents the use of a person's property for a legitimate business purpose is a regulation that goes too far. As a regulation that goes too far, it must be recognized as a taking.

In so arguing, the petitioner has confused the issues of "regulatory takings," or laws restricting property rights that are invalid because they go too far, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), with "takings" in violation of the Fifth and Fourteenth Amendments, which require compensation because the property owner has been deprived of all economically beneficial use of his land "without just compensation." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 137 L. Ed. 2d. 980, 117 S. Ct. 1659 (1997).

The petitioner asserts that because the zoning ordinance was found invalid under Pennsylvania law, that such a finding, standing alone, entitles the landowner to claim damages for the period of time which elapsed while the landowner pursued his state law remedies. This Court has never so held.

This Court has always recognized that normal delays associated with the process of obtaining zoning relief do *not* result in compensable "takings"[4] and has not recognized a cause of action for "temporary takings" damages unless the regulation has deprived the property owner of all economically beneficial use of the property for a period of time. *First English Evangelical Lutheran Church v. County of Loss Angeles, supra.*

4. The Pennsylvania Supreme Court alluded to the practical effect of such a finding in its own footnote 4 (Appendix A) where it stated,

> Moreover, we note that a holding to the contrary could have a chilling effect on land use planning as the adoption of an invalid ordinance could prove financially devastating to a municipality which unsuccessfully defends a lengthy constitutional challenge.

To convert all local zoning disputes where the landowner ultimately prevails into compensable "takings" which entitle the landowner to claim federal monetary damages from the local taxpayers whose elected officials in good faith defended the offending regulation would be a shocking and unwarranted change in federal constitutional law.

Indeed, if the process of challenging (and defending) a zoning ordinance in Pennsylvania held out the promise not only of site-specific relief but also a windfall at the taxpayers' expense, the entire scheme of regulatory land uses would probably collapse under the collective weight of the threat of bankruptcy of the municipal treasury, and the futility of predicting the result. (For an interesting discourse on the Commonwealth Court's inability to predict the Pennsylvania Supreme Court's land use opinions, see Commonwealth Court Judge Craig's opinion in *H & R Builders, Inc. v. Borough Council of Norwood*, 124 Pa. Cmwlth. 88, 555 A.2d 948 (1989), or the procedural history of the case of *Upper Salford Township and Upper Salford Township Citizens for Open Space v. Patrick T. Collins Jr.*, 162 Pa. Cmwlth. 403, 639 A.2d 861 (1994), *reversed* at 542 Pa. 608, 669 A.2d 335 (1995)).

Fortunately, that's never been the law. The Courts have always recognized that any regulation limits some land owner's rights, and that limitation is not a compensable taking. As one commentator put it:

> Some have the view that ownership of a piece of property entitles the owner to do whatever he or she pleases with or on the land. This has never been the law in any country. In Western European democracies, for example, where many people are crowded upon a relatively small amount of land, it is accepted by conservatives and liberals alike that the government must regulate land use in the general public interest. No one assumes that the government must buy land to protect it.

"The Takings Issue," Joanne Denmark, Esquire, et al., in *Forum*, Pennsylvania Environmental Council, Volume 21, Nos. 2 and 3, Summer/Fall 1992.

Although the petitioner concedes that it was never denied all economically beneficial use of its property by the Plumstead Zoning Ordinance, it argues that because it was denied the right to make use of its property in the way that it wished (a quarry) for a period of time, it is entitled to claim damages for that period.[5] Moreover, the period of time for which damages are claimed is the time it took to challenge the ordinance in court.

Such has never been the law. Regulatory ordinances have never been analyzed against the subjective desires of an individual landowner, but on whether the regulation, as applied to the particular land, unfairly burdens an individual landowner with a "cost" or "burden" that should be borne by the public at large. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 496, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). To hold otherwise would require legislators to anticipate the secret, subjective desires of all present and future property owners before enacting any regulations.

Additionally, so long as the landowner has a Due Process procedure available to invalidate the law, the process itself has not given rise to a "temporary takings" claim.

---

5. Petitioner cites various state court opinions for the proposition that "temporary takings are compensable in the zoning context," and while it is conceded that *First English* makes that point, state court decisions on the validity of land use regulations are not relevant to the considerations involved in seeking certiorari. In addition, land use is generally a matter of state law, not federal law, and varies greatly from state to state, making comparisons difficult, if not impossible.

In short, petitioner seeks an unwarranted extension of the "temporary takings" doctrine so clearly enumerated by this Court in *First English*, and so faithfully followed by the Pennsylvania Supreme Court in its opinion below.

CONCLUSION

For the foregoing reasons, respondent notes the Pennsylvania Supreme Court's faithful adherence to this Court's opinion in *First English Evangelical Church v. Court of Los Angeles*, *supra*, and asserts that petitioner seeks an unwise and unwarranted extension of the federal "temporary takings" doctrine which should be refused.

Respectfully submitted,

CATHERINE M. HARPER
Counsel of Record
TIMONEY, KNOX, HASSON
& WEAND, L.L.P.
Attorneys for Respondent
400 Maryland Drive
P.O. Box 7544
Fort Washington, PA 19034-7544
(215) 646-6000